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No. 346

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

SOCONY-VACUUM OIL COMPANY, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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173258—39——1

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The Solicitor General prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Seventh Circuit reversing and remanding for a new trial the above entitled case.

OPINIONS BELOW

The opinion of the District Court (R. 2488) is reported in 23 F. Supp. 937. The opinion of the Circuit Court of Appeals (R. 3911) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 27, 1939 (R. 3954). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act

of February 13, 1925, and as modified by Rule XI of the Rules of Practice and Procedure after verdict in Criminal Cases.

QUESTIONS PRESENTED

The evidence in this case shows that the defendants, who controlled a substantial part of the gasoline industry in ten Mid-western States, combined together for the purpose, and with the effect, of raising and maintaining at controlled levels their selling prices to jobbers and to consumers in that area. This was accomplished by purchasing in concerted programs a substantial part of the "spot" gasoline sold by independent refiners which, pursuant to contracts or marketing practices, fixed the selling prices. The trial court instructed the jury that if it found that the defendants had the power to raise gasoline prices and had combined for that purpose, the restraint of trade was unreasonable and illegal. The principal question presented is whether this instruction was reversible error.[1]

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[1] The opinion of the court below also raises three subordinate questions. These further questions are whether the trial court erred:

1. In the exclusion of evidence.

2. In the manner in which it permitted Government counsel to refresh the recollection of hostile witnesses by the use of transcripts of grand jury proceedings.

3. In permitting certain remarks of Government counsel in closing arguments to the jury.

The court viewed the first question principally as turning upon the main question in the case. With respect to the second question, there is some doubt whether the Circuit

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Sec. 1), known as the Sherman Antitrust Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

STATEMENT

The respondents, twelve large corporations engaged in the petroleum business and five of their officers or employees, were indicted and convicted in the United States District Court for the Western District of Wisconsin for violating Section 1 of the Sherman Antitrust Act.[2] The Circuit Court

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Court of Appeals found that the District Court committed reversible error. The court expressly declined to determine whether the trial court committed reversible error with respect to the closing arguments, but stated that the remarks were "a very serious obstacle to affirmance of the judgment" (R. 3950).

[2] Four other corporations and twenty-five other individuals were also convicted by the jury (R. 2433, 2434). Of these, the trial court granted new trials to fifteen individuals and

of Appeals for the Seventh Circuit upon appeal reversed the judgments of conviction and remanded for a new trial.

The indictment (R. 2–18) charges a combination and conspiracy to raise, fix, and maintain the wholesale and retail prices of gasoline sold in ten Mid-Western states, referred to herein as the Mid-Western area, during the years 1935 and 1936. It alleges, in substance, that gasoline prices, both wholesale and retail, in the Mid-Western area are controlled by Mid-Continent and East Texas spot market prices, and that the defendants combined and conspired together to raise and fix the spot market prices and thereby to raise and fix gasoline prices in the Mid-Western area by artificially bidding up and maintaining the prices of gasoline on the spot markets through the operation of two concerted gasoline buying programs in the Mid-Continent and East Texas fields.

The evidence as to the marketing structure in the Mid-Western area[3] is virtually undisputed.

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three corporations (R. 2491) and ordered judgments *non obstante veredicto* for ten individuals and one corporation (R. 2490). The validity of the orders for judgments *non obstante veredicto* is now before this Court in the case of *United States of America* v. *Honorable Patrick T. Stone, United States District Judge for the Western District of Wisconsin*, No. 48, this Term.

[3] The Mid-Western marketing area, as known in the oil industry, is composed of the ten states of North Dakota, South Dakota, Minnesota, Iowa, Missouri, Kansas, Illinois, Wisconsin, Michigan, and Indiana (R. 176–7). Over 21% of all the gasoline sold in the United States in 1935 was sold

The defendant oil companies [4] sold about 85%, and the respondents about 54%, of all the gasoline consumed in the Mid-Western area.[5] The remaining 15% of the gasoline sold in that marketing area was refined by small refiners, known as independent refiners, located in the Mid-Continent and East Texas oil-producing fields.[6]

During the period covered by the indictment and for several years prior thereto the defendant companies sold a substantial portion of their gasoline to jobbers [7] under contracts which provided that the price to be paid by the jobber should be determined upon the basis of so-called tank car spot market quotations appearing daily in two trade journals, the Chicago Journal of Commerce and Platt's Oilgram.[8]

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in those states, amounting to almost 5,000,000,000 gallons, and over 25%, amounting to nearly 5,500,000,000 gallons, was sold in 1936 (Ex. 947 (R. 3639); R. 188).

[4] All of the companies are known as major or semi-major companies because they are fully or semi-integrated, combining the functions of production, transportation (by pipe line), refining, and distribution (R. 185, 186, 188; Exs. 1028 (R. 3812), 947 (R. 3649)).

[5] R. 186, 188, 3915; Exs. 947 (R. 3639), 1028 (R. 3812).

[6] R. 187, 188.

[7] A jobber is a middleman who purchases gasoline in tank car lots, generally from refiners, and owns storage or bulk plants from which he delivers gasoline in tank wagons or trucks to retail service stations owned or operated by him or by retail dealers, or directly to large consumers (R. 185, 188, 226, 236, 239, 243, 294, 305).

[8] R. 188, 189; Exs. 618–621 (R. 3031–42), 624–627 (R. 3046–57), 1028 (R. 3813–14).

Apart from sales to jobbers and to large consumers, the defendant companies marketed the rest of their gasoline through service stations, some of which they owned and operated themselves and some of which were independently owned and operated.[9] During 1935 and 1936 retail gasoline prices in the Mid-Western area were also determined by the spot market quotations published in the two trade journals.[10]

The quotations in the journals upon which the Mid-Western jobber and retail prices were based purport to represent the range of prices paid for each grade of gasoline in spot-market transactions in the Mid-Continent fields.[11] Spot market transactions are day to day sales, generally to jobbers, at refineries for delivery immediately or at a specified

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[9] R. 185–6, 253–4; Ex. 1028 (R. 3813–14).

[10] The evidence showed that Standard Oil Company (Indiana) was known as the market leader in the Mid-Western area (R. 176, 800). It posted its normal retail service station prices throughout the area, and all retail distributors, whether independent or owned or controlled by jobbers or refiners, customarily followed those prices (R. 176, 252, 254, 291, 325, 328). Prior to the indictment period Standard adopted the policy of determining those retail prices by adding a fixed differential for distribution costs to the spot market tank car quotations appearing in the Journal of Commerce and Platt's Oilgram (R. 1233–35). This policy was continued in practice throughout most of the indictment period so that during that time the differential between the spot market tank car prices as published in the journals and the normal retail prices of retail distributors, exclusive of taxes and transportation costs, was almost invariably 5½¢ (R. 251, 279, 290, 800).

[11] R. 190; Ex. 730 (R. 3200).

time in the future.[12] Substantially all of the gasoline which is sold on the spot market is sold by independent refiners, the gasoline so sold constituting only from 5% to 7½% of all the gasoline sold in the Mid-Western area.[13]

It therefore appears that during the indictment period the prices at which the defendant companies sold the great bulk of their gasoline in the Mid-Western area were directly controlled and determined by prices in spot-market sales by independent refiners of gasoline amounting to not more than 7½% of all the gasoline sold in the ten-state area.

Respondents, with immaterial exceptions, admitted in the Circuit Court of Appeals that they participated in a concerted program for the purchase of gasoline from independent refiners in the Mid-Continent fields at "going market prices" from March 1935 to May 1936 for the purpose of stabilizing the tank-car market.[14] The real purpose and practical effect of the buying program was, however, sharply contested by the respondents. The evidence relied upon by the Government may be summarized as follows:

The program was organized at a series of meetings held during the first three months of 1935. At the first meeting a committee called "The Tank Car Stabilization Committee" was appointed to

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[12] R. 189, 244, 624, 1004–05.

[13] R. 180, 736–7, 797–9.

[14] R. 3918–3919.

consider "ways and means of establishing and maintaining a strong tank-car market on gasoline."[15] After "the effect of lower tank-car markets for gasoline on the retail price structure was discussed" by the committee, a buying program was proposed, and the committee, with one exception, "unanimously agreed that a continuous purchasing program was necessary" and "that the most efficient method to handle the situation would be for individual major purchasers to arrange with individual small refiners to keep their surplus off the open market."[16]

Surveys submitted at the meetings showed that sixteen or seventeen independent refiners in the Mid-Continent fields had each month surplus gasoline totalling from 600 to 700 cars.[17] Each of the defendant companies represented at the meetings elected to take one or more of the independent refiners as "dancing partners" and to "assume responsibility for their surplus."[18]

It was contemplated that the Tank Car Stabilization Committee should meet monthly to receive surveys of surplus gasoline appearing on the market each month and to pass the information on to the defendant companies.[19] A mechanical subcommittee of three was appointed to act as a clearing

[15] Ex. 376 (R. 2977); R. 1168–70.
[16] Exs. 173 (R. 2731), 177 (R. 2733); R. 1178–85.
[17] R. 367, 1179, 1187, 1189, 1196–97.
[18] Ex. 376 (R. 2978); R. 369, 371–2, 384, 1187–88, 1196–97.
[19] R. 1182–83, 1194, 1199, 1219.

house between the independent refiners and the defendants in their purchasing activities, and to provide for the disposal to the defendants of surplus gasoline not anticipated in the monthly surveys.[20] The subcommittee was also "to guide and control periodically the prices to be paid" by the buying companies.[21]

The independent refiners who sold to the defendants in the program were named in the indictment as co-conspirators. They met with the defendants at these meetings and agreed to cooperate.[22] It was understood between the defendants and independent refiners that the defendant companies would purchase the independents' surplus gasoline at the low quotations of the trade journals and that the independent refiners would then advance their prices to their regular trade, which prices would in turn be reported in the journals.[23] Surplus gasoline was defined as all gasoline which could not be sold at "going market prices."[24] Thus, in effect, the defendant companies, with their combined purchasing power almost unlimited, placed themselves in the position of insurers to buy up all gasoline which the independent refiners could not sell to their regular trade at

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[20] R. 1189–90, 1195, 1199, 1219; Ex. 681 (R. 3111).

[21] Ex. 376 (R. 2977).

[22] R. 362, 401–4, 1192–95, 1703–05; Exs. 137 (R. 2725–26), 176 (R. 2732).

[23] R. 404, 407.

[24] R. 385–6, 642.

prices at or above the market level which the defendants were seeking to maintain in the journals.

The program commenced operation on March 7, 1935.[25] From then until April 1936 the defendants made regular purchases each month under the program, of gasoline, from the independent refiners.[26] This constituted from 34% to 51% in 1935 and from 38% to 57% in 1936 of all the gasoline sold on the spot market by the Mid-Continent independent refiners named as conspirators in the indictment, and from approximately 20% to somewhat over 30% during both years of all the gasoline sold on the spot market by twenty-nine independent refiners in the Mid-Continent fields.[27] The purchasing operations of the defendants were carefully supervised and controlled by the two committees previously mentioned, each of which met at frequent intervals to carry out its functions.[28] There was substantial evidence to show that the mechanical subcommittee functioned to "guide and control" the purchase prices "on an ascending market" during the periods when the market advanced.[29] The defendant companies reported

[25] R. 1199–1200, 1706.

[26] R. 396–7, 400, 432–4, 1219, 1776–77; Exs. 230–232 (R. 2823–27), 747 (R. 3271), 812A–814B (R. 3303–10).

[27] R. 189; Ex. 1023 (R. 3803).

[28] R. 391–5, 396–7, 399–400, 444–5, 448–55, 1199, 1205–06, 1207, 1208, 1216; Exs. 101 (R. 2702), 240 (R. 2835).

[29] Between March and June 1935, when the price level was advancing, the committee recommended from five to eight advances in purchasing prices (R. 410–1, 412, 416, 500). After

monthly the volume of purchases and prices paid in the course of the program.[30]

There was also substantial evidence that the defendants, through the instrumentality of a trade association of independent refiners selling on the spot market in the East Texas field, also operated a buying program in that field in which they purchased from 600 to 700 cars of gasoline each month from independent refiners at going market prices in order to prevent that gasoline from moving into the Mid-Western area and competing with gasoline from the Mid-Continent fields.[31]

Simultaneously with the beginning of the operation of the buying programs, spot-market prices started an upward march with advances of from 1/8¢ to 1/4¢ occurring at least once every fourteen days until June 1935, when they had advanced approximately 1½¢ per gallon.[32] From June until the end of 1935 prices were practically frozen at the levels attained and there were only two price

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the committee's last price recommendation in 1935 there were no further advances that year in the market (R. 459–460). In January 1936, when the price of crude oil advanced, another price increase was recommended, and prices again advanced (R. 411, 459–60; Ex. 376 (R. 2978).

[30] Exs. 102 (R. 2703), 103–118 (R. 2704–16), 450 (R. 2985), 490–508 (R. 3000–16).

[31] R. 566–602, 632–64, 1708–27; Exs. 14, 15 (R. 2615–17), 17 (R. 2619), 36 (R. 2635), 40 (R. 2636), 54–68 (R. 2638–52), 69 (R. 2658), 305 (R. 2956), 358–359 (R. 2974), 432 (R. 2984), 442 (R. 2985), 482, 483 (R. 2996), 487, 488 (R. 2997–98).

[32] See defendants' Exhibits 679–680 for identification for the price trend during the indictment period (R. 3105–09).

declines throughout the rest of the year, both of short duration and accounted for by temporary let-ups in the buying under the programs.[33] Retail prices throughout the Mid-Western area, since they were tied to the spot-market prices, also advanced proportionately and were held at a proportionately high level.[34]

The inflexibility of the market was unparalleled in the history of the industry.[35] The price advance occurred in the face of very adverse weather conditions with consequent slow jobber demand on the spot market.[36] After the advances were established the market was completely unresponsive to normal fluctuations in jobber demand. No change of note occurred in the fall of 1935 although consumer demand for gasoline dropped off with the end of the high consuming season and the approach of winter.[37] Prices not only failed to decline but actually advanced during the winter of 1935-1936, which was "the most unfavorable winter for gas-

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The trend of prices in these charts is identical with the trend in other charts introduced in evidence by the defendants. See, for example, defendants' Exhibit 1024 (R. 3805).

[33] R. 1862–63; Exs. 197 (R. 2780), 269 (R. 2885), 280 (R. 2918), 281 (R. 2921).

[34] Ex. 674 (R. 3097).

[35] R. 223, 238, 247–8, 280–2, 317.

[36] Exs. 682 (R. 3112), 684 (R. 3114), 688 (R. 3118), 689 (R. 3119), 692 (R. 3122).

[37] Exs. 270 (R. 2888), 271 (R. 2891), 272 (R. 2894), 277 (R. 2909), 278 (R. 2912), 694 (R. 3124).

oline consumption that the industry has seen in years." [38]

There was substantial evidence to show that the buying programs were the direct and immediate cause of the price rise and the phenomenal rigidity in the market. The rise in the market correlated significantly with the price recommendations of the mechanical subcommittee.[39] Representatives of the defendants repeatedly attributed the price rise and stability in the market to the purchasing activities of the defendants.[40]

The foregoing discussion demonstrates that there was substantial evidence to show (1) that the defendants, controlling 85% of the gasoline business in the Mid-Western area, engaged in the buying programs for the purpose of raising and maintaining the prices at which they sold their products; (2) that the defendants controlled the spot-

[38] Ex. 706 (R. 3137).

[39] There were 7 advances in the prices of both regular and third-grade gasoline during the period from March 7, 1935, when the Mid-Continent program started operation, and June 1935 when prices finally leveled off. During this period the mechanical subcommittee recommended from 5 to 8 advances in the purchasing prices (*supra*, p. 10, footnote 29). The committee, as we have seen (*ibid.*), made no further recommendations in 1935 after June 1. Market prices remained rigid from June to December.

[40] Exs. 22 (R. 2624), 40 (R. 2636), 218 (R. 2819), 251 (R. 2846), 253 (R. 2852), 254 (R. 2855), 268 (R. 2882), 271 (R. 2891), 273 (R. 2897), 276 (R. 2906), 277 (R. 2909), 682 (R. 3112).

market prices, upon which their own prices were based, by reason of the cooperation supplied by the independent refiners and of the defendants' power and willingness to purchase all spot-market gasoline necessary to raise and maintain prices; and (3) that prices, in fact, advanced and remained phenomenally rigid for many months as a result of the buying programs. The defendants, on the other hand, offered evidence designed to show (1) that they did not combine together for the purpose of controlling prices; (2) that their purchasing activities were confined to "distress" material, the removal of which did not suppress normal competition on the spot markets; and (3) that the rise in prices and subsequent rigidity were caused by factors other than the buying programs.

The District Court submitted to the jury these contested issues as to the purpose, power, and effect of the combination by instructing the jury that it might find the defendants guilty if, but only if, it found (1) that the defendants had the power to raise gasoline prices, and (2) that they had combined for that purpose as charged in the indictment. We set forth an illustrative portion of the charge in a footnote.[41] Insofar as the court in-

[41] "If you find that the defendants, and those acting in concert with them, controlled the greater part of the gasoline sold in the ten Middle Western States, and had the power to raise the price of that gasoline, and that the defendants and these other persons acting with them had knowingly engaged in a combination to raise or fix the price to be charged

structed the jury that the combination was illegal if the parties thereto had the purpose and power to raise prices, the court applied to the circumstances of this case the holding of this Court in *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, that an agreement by members of a combination controlling a substantial part of an industry to fix and maintain uniform minimum selling prices is unlawful *per se*.

The Circuit Court of Appeals held that the *Trenton Potteries* case was inapplicable here, and that the District Court's instruction was erroneous.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the trial court erroneously charged the jury that if it found that the defendants had the power to raise gasoline prices and that they combined for that purpose as charged in the indictment the restraint of trade was as a matter of law unreasonable and, therefore, unlawful.

(2) In holding that the decision of *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, is inapplicable to the case at bar.

(3) In holding that the trial court failed to submit to the jury the question of the nature and extent of the effect of the combination upon competi-

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for gasoline to jobbers or consumers in the Mid-Western area as charged in the indictment, then you will understand that these defendants have violated the Sherman Act, and are guilty as charged in the indictment." (R. 2405.)

tion on the spot markets and, particularly, upon spot market prices.

(4) In holding that the trial court should have instructed the jury that, even if it found that the defendants in combination had the purpose and power to raise and maintain prices, it might still find the restraint of trade reasonable and, therefore lawful.

(5) In holding that the trial court misdirected the jury.

(6) In holding that the trial court erred in the exclusion of evidence.

(7) In holding that the trial court erred in the manner in which it permitted Government counsel to refresh the recollection of hostile witnesses by the use of transcripts of grand jury proceedings.

(8) In holding that certain remarks of Government counsel in closing arguments were improper and that other remarks, alleged to be improper, were not trivial in effect.

(9) In reversing the judgments of conviction and remanding for a new trial.

REASONS FOR GRANTING THE WRIT

I

This case is one of unusual magnitude and of great public importance. More than three years have been devoted to its prosecution and the trial alone consumed more than three months. The respondents are among the largest companies in the oil industry Their activities under attack in these

proceedings covered ten states and directly affected the price of 25% of all of the gasoline sold in the United States. It is in the public interest to have the issues as to the legality of these activities determined by this Court.

II

The case presents a question of manifest importance in the general administration and enforcement of the antitrust laws which should be finally determined by this Court. In *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, this Court held that price fixing by members of a combination controlling a substantial part of an industry was illegal *per se*. The District Court charged the jury in the case at bar squarely in conformity with the rule laid down in the *Trenton Potteries* case and in numerous other decisions of this Court.[42] In the *Trenton Potteries* case the parties agreed upon the specific minimum prices which they would charge for their products, whereas in the present case the agreement was to raise and maintain prices at controlled levels without an express agreement upon specific selling prices. The important question in this case is, therefore, whether the latter type of

[42] *United States* v. *Trans-Missouri Freight Ass'n*, 166 U. S. 290; *United States* v. *Joint Traffic Ass'n*, 171 U. S. 505; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Swift and Company* v. *United States*, 196 U. S. 375; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553.

agreement falls within the ruling in the *Trenton Potteries* case.

The Circuit Court of Appeals did not in terms pass upon this question of law because, as will be shown (*infra*, pp. 22–25), it misunderstood the scope of the issues submitted to the jury by the trial court's instructions. However, its broad holding that the trial court's charge embraced a theory which was "inapplicable here" (R. 3941), its analysis of the cases relied upon by the Government (R. 3924–26), and the parallel which it drew between the case at bar and *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, unite to indicate that the court was of the opinion that, even if the jury found that the defendants in combination had the power to raise and maintain prices and the intent to exercise that power, the jury might still find the combination reasonable and the defendants innocent. Such, at least, is the conclusion which seems inevitably to follow from reading the opinion as a whole and which very likely would be followed by the trial court on a new trial. Such a rule, we submit, cannot be reconciled with the decision of this Court in *United States* v. *Trenton Potteries Co.*, *supra*.

The *ratio decidendi* of the *Trenton Potteries* case, as we understand it, is that an agreement by those controlling a substantial part of an industry to eliminate price competition among themselves for the purpose of raising and maintaining market prices gives rise to such imminent danger of and poten-

tialities for arbitrary enhancement of prices through monopolistic price control that such an agreement falls *per se* within the direct condemnation of the Sherman Act.

In the case at bar the defendants by agreeing to purchase noncompetitively on the spot markets eliminated price competition among themselves just as effectively and fully as under an agreement to sell at uniform minimum prices. In addition to this voluntary elimination of competition among themselves, the combination possessed an objectionable element not present in the agreement in the *Trenton Potteries* case. The defendants also effected an involuntary restraint upon the competition of other purchasers on the spot markets. By purchasing all the gasoline which could not be sold at the designated price, the defendants compelled other purchasers to pay artificially high prices for the spot market gasoline which remained. This voluntary elimination of competition among the defendants and involuntary restraint upon the competition of other purchasers on the spot markets was used by the combination to obtain and exercise the power to enhance and control prices just as clearly and directly as was the simple agreement to fix uniform minimum selling prices in the *Trenton Potteries* case.

The dangers of a harmful exercise of the power thus obtained are even greater than in a combination of the type condemned in the *Trenton Potteries* case. The inflexibility of minimum uniform

sales prices, forbidding defensive price adjustments, leaves the parties vulnerable to such outside competition as may exist. There are, moreover, evident practical difficulties in reaching an express agreement upon uniform prices to govern transactions of the future; and, once an agreement is obtained, continued adherence by the parties will be uncertain because of the temptation for the parties to secure a competitive advantage by selling below the prices agreed upon. On the other hand, the flexibility of a combination such as the present one, which does not fix an exact minimum price, but instead exercises a constant control over the price level, gives the parties more freedom to adjust prices to withstand outside competition and to meet the special circumstances which would threaten disruption of a uniform price agreement. Likewise, there must be considered the unusual nature of the marketing structure here, which permitted the parties automatically to raise and maintain their own selling prices simply by purchasing a small amount of gasoline on the spot market.[43] This made unneces-

[43] The purchases in each of the two programs amounted to between 600 and 700 cars per month (*supra*, p. 10, footnote 26; p. 11), which amounted to 134,400,000 gallons per year. In 1935 the defendants whose cases went to the jury sold 3,625,000,000 gallons of gasoline in the Mid-Western area (Ex. 1028, R. 3815). The combination, therefore, entailed a buying commitment on the part of these defendants of less than 4% of their actual sales requirements.

sary an express agreement on selling prices and permitted the parties to obtain higher prices without the risk of nonadherence which is present when parties combine by agreement upon uniform minimum prices.

The Circuit Court of Appeals, in concluding that the present case was to be determined by broad tests of reasonableness rather than on the sole test of whether the combination possessed and intended to exercise the power to control prices, relied upon *Appalachian Coals, Inc.* v. *United States, supra,* (R. 3931–32, 3939). In that case this Court declined to restrain the operation of a proposed sales agency agreement under which 137 bituminous coal producers, producing less than 12% of the total coal produced east of the Mississippi River, agreed to market their coal exclusively through a common sales agency. Although this Court found that price competition between the parties to the agreement would be eliminated, the Court repeatedly stressed the fact that there was neither the intent nor power to fix or control market prices. (288 U. S. 344, 373, 374, 375.) We submit, therefore, that this decision, rather than supporting the view of the Circuit Court of Appeals, clarifies the holding in the *Trenton Potteries* case and emphasizes its applicability to the facts in the present case by showing that it is the power to control price, when coupled with the purpose to exercise

such control, that renders illegal an agreement eliminating competition."

The holding of the Circuit Court of Appeals that the *Trenton Potteries* case is inapplicable here may virtually destroy the effect of that decision. If generally followed, the ruling may permit a combination to obtain, by methods somewhat different from agreements upon uniform prices but equally direct and effective, the identical power of price control which, when found in a combination to fix uniform selling prices, led this Court to condemn the combination as inherently unlawful.

III

The holding of the Circuit Court of Appeals, that the *Trenton Potteries* case is inapplicable, is interwoven with an interpretation of the District Court's charge to the jury, which, we submit, is clearly erroneous. The Circuit Court of Appeals held that the case should have been submitted to the jury "solely upon the issue of the character of the restraint imposed" (R. 3940–41). In support of its holding the court stated (R. 3932–33) that, since the defendants purchased not more than one-third of the gasoline sold on the spot market, the remaining two-thirds not involved in the program

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" Under circumstances where there is power to control the price of the entire market, a situation different from that presented in the *Appalachian Coals* case, the possibility of distressed conditions in the industry (relied upon by the court below) is an argument for a legislative program, not for escape from the provisions of the Antitrust laws.

"was sold on the market as had theretofore been done" and that therefore "it cannot be held that competition on the spot market was eliminated." The court concluded (R. 3933) that "the most that can be said is that the buying programs had an effect on competition, and whether that effect was such as to produce an unreasonable restraint upon commerce, was one of fact."

The Government has no quarrel with the court's conclusion that the extent and nature of the effect of the buying programs upon competition on the spot markets could not be determined as a matter of law but was a question of fact for the jury. Where the court erred was in failing to appreciate that this very question of fact was actually submitted to the jury and determined by it adversely to the respondents' contentions.

The trial court did not instruct the jury that the buying programs were illegal *per se*. On the contrary, as we have seen (*supra*, p. 14), it required the jury first to determine from a consideration of all the surrounding circumstances (1) that the defendants combined together for the purpose of raising and maintaining prices, and (2) that they had the power in combination to effectuate that purpose. We submit that this instruction as to power required the jury to determine precisely what the Circuit Court of Appeals said was a question for the jury, that is, whether, as was claimed by the respondents, the combination merely produced an incidental effect upon the spot markets or

whether, as the Government claimed, the defendants by their buying activities actually controlled the spot markets in such a way that they were enabled virtually to fix those prices."[45] Thus, the jury by its verdict determined that the spot market gasoline not purchased by the defendants did not continue, as the Circuit Court of Appeals held, to be "sold on the market as had theretofore been done," but that, although that gasoline continued to be sold to jobbers, it was sold in a market controlled by the defendants and their coconspirators, the independent refiners.

Added indication that the court failed to appreciate that the question, which it conceived was one of fact for the jury, was actually submitted to the jury is shown by its observations on the causes for the price rise and stability in the market. The court stated that while the condition of the market was "a rather convincing circumstance," indicating that the defendants had the power to and did control prices, it was not so convincing in

[45] We do not consider it necessary to discuss further here the evidence relied on by the Government to show that the entire spot market was rendered noncompetitive by the defendants' programs, since implicit in the court's conclusion that it could not determine the effect on the market as a matter of law is a finding that there was competent evidence before the jury on that question. But we desire to call attention again to the significant evidence concerning the cooperation of the independent refiners (*supra*, pp. 9–10). In charging the jury on the question of power the court instructed the jury to consider also the power "of those acting in concert" with the defendants (*supra*, p. 14, footnote 41).

view of the evidence offered by the defendants, which the court recited at some length, to show that prices were not noncompetitive. The court stated (R. 3934) that it cited these circumstances "in emphasis of our conclusion that the effect upon competition and trade produced by the programs in operation was a factual one with plenty of meritorious argument both pro and con." But, here, also, this "factual" question was submitted to the jury and determined by it. The jury was expressly instructed to ascertain the cause for the price rise and subsequent rigidity and to acquit the defendants unless it found that the price increase and its continuance at the level shown by the evidence was caused by the combination."[46]

IV

In addition to its decision upon the principal question involved, the Circuit Court of Appeals also considered certain subordinate questions relating to the exclusion of evidence, the use of transcripts of grand jury proceedings to refresh the

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[46] The trial court, after outlining the various contentions of the parties as to the factors causing the price rise and rigidity, instructed the jury (R. 2407):

"Now, unless you find from the testimony and believe beyond a reasonable doubt that the said price increased, and its continuance at the level shown by the evidence was caused by an unlawful agreement or combination of the defendants, as alleged in the indictment, and as heretofore defined and explained to you, and not caused by the factors aforesaid, then it is your duty to acquit the defendants and to return verdicts of 'not guilty.'"

recollection of hostile witnesses, and the propriety of remarks by Government counsel in closing arguments to the jury. In the event that certiorari is granted, we shall also urge that the court below erroneously decided or commented upon these subordinate questions.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Acting Solicitor General.

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